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I. INTRODUCTION

Joseph Hirko has been sued by the SEC for securities fraud, but asks the Court to ignore the SEC's allegations because plaintiffs do not plead them. The SEC allegations against him, however, need not be incorporated into a pleading to be considered on a motion to dismiss. The Court may take judicial notice of the securities fraud allegations against Hirko, just as the Court did when it considered SEC allegations against Kevin A. Howard and Michael W. Krautz in connection with Kenneth D. Rice's motion to dismiss. Hirko's motion to strike should be denied.

II. ARGUMENT

Hirko urges the Court to disregard the SEC's allegations that he committed securities fraud because plaintiffs did "not reference, incorporate, or even hint at the allegations" in the First Amended Complaint. Motion to Strike at 7, 9. The Court, however, may take judicial notice of the SEC's claims against Hirko.

"Federal courts are permitted to refer to matters of public record when deciding a 12(b)(6) motion to dismiss." *Davis v. Bayless, Bayless & Stokes*, 70 F.3d 367, 372 n.3 (5th Cir. 1995) (taking judicial notice of Texas state court orders); *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) (taking judicial notice of a consent judgment drafted by an assistant district attorney). Following the Fifth Circuit's lead, on several occasions this Court has stated it may "take judicial notice of ... documents of public record." *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 882 (S.D. Tex. 2001); *Collmer v. U.S. Liquids, Inc.*, No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *4 (S.D. Tex. Jan. 23, 2001).

During this litigation, the Court has considered items not included in the complaint but referenced in Lead Plaintiff's oppositions to motions to dismiss. *See In re Enron Corp. Sec.*, 235 F. Supp. 2d 549, 651 n.87, 703 (S.D. Tex. 2002). In its December 20 Order, the Court addressed allegations against Merrill Lynch which Lead Plaintiff "briefly referenc[ed]" in "its opposition to Vinson & Elkins' motion to dismiss" and "in its opposition to Merrill Lynch's motion to dismiss," but did not include in its operative pleading. *Id.* at 651 n.87. More recently, the Court took judicial notice of the SEC's securities fraud allegations against Kevin A. Howard and Michael W. Krautz in denying Kenneth D. Rice's motion to dismiss. *In re Enron Corp. Sec.*, No. H-01-3624, 2003 U.S.

Dist. LEXIS 7632, at *27 n.7 (S.D. Tex. Apr. 24, 2003). The Court may similarly take judicial notice of the SEC's allegations against Hirko, which corroborate the securities fraud claims against him in the First Amended Complaint and the indictment that has been leveled against him by the United States.

Hirko argues the Court must ignore the SEC's allegations unless they fall within the "public disclosure" exception. Motion to Strike at 8-9. In *Lovelace v. Software Spectrum*, 78 F.3d 1015 (5th Cir. 1996), Hirko's authority for this assertion, the Fifth Circuit simply considered whether courts may take judicial notice of "public disclosure documents required by law to be filed, and actually filed, with the SEC." *Id.* at 1017-18. *Lovelace* never restricted the doctrine of judicial notice to only "public disclosure documents." *See id.*

Hirko objects to the Court taking judicial notice of the SEC's allegations because they are not "facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Motion to Strike at 9 (citation omitted). Lead Plaintiff is not asking the Court to assume the truth of the factual assertions in the SEC's complaint, but rather to notice the existence of the SEC's compelling allegations of securities fraud against Hirko. The possibility Hirko might deny the SEC's charges is simply beside the point. At this stage of the litigation, the Court must accept Lead Plaintiff's allegations as true and view them in the light most favorable to plaintiffs and the class. *See Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000).

Citing *Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) and *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989), Hirko alleges "a complaint may not be amended by the briefs in opposition to a motion to dismiss." Motion to Strike at 7 (citation omitted). This argument misses the mark. The Fifth Circuit permits the Court to take judicial notice of matters of public record. *See, e.g., Davis*, 70 F.3d at 372; *BMC*, 183 F. Supp. 2d at 887.

Because the Court may consider matters of public record when deciding a motion to dismiss, in this case the SEC's complaint against Hirko, Hirko's motion to strike should be denied.


III. CONCLUSION

For the reasons set forth above, Lead Plaintiff respectfully requests that the Court deny Hirko's motion to strike.

DATED: July 21, 2003

Respectfully submitted,

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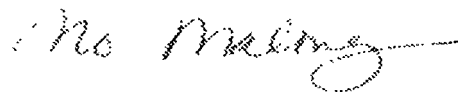
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' OPPOSITION TO JOSEPH M. HIRKO'S MOTION TO STRIKE FROM THE RECORD "EXHIBIT A" TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO HIRKO'S MOTION TO DISMISS has been served by sending a copy via electronic mail to serve@ESL3624.com on this 21st day of July, 2003.

I further certify that a copy of the foregoing PLAINTIFFS' OPPOSITION TO JOSEPH M. HIRKO'S MOTION TO STRIKE FROM THE RECORD "EXHIBIT A" TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO HIRKO'S MOTION TO DISMISS has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 21st day of July, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
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Mo Maloney